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Prevention of Unfair Business Practices in California: A Proposal for Effective Regulation

By Rod Divelbiss*

Consumers in California traditionally have benefited from protective legislation and far-reaching judicial determinations in their battle against unfair business practices.¹ Nevertheless, section 17200² of the California Business and Professions Code, potentially an important resource in the enforcement of consumer rights, has remained relatively dormant since its enactment in 1933.³ Section 17200 provides that it is unlawful for a person or business to perform any unlawful, unfair, or fraudulent business practice that may affect either consumers or other business enterprises.⁴

The absence of standards for determining what constitutes "unfairness" in the context of section 17200 is the primary reason for the statute's ineffectiveness. Additionally, recent judicial developments threaten to deny the remedy of damages to consumers

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1. See Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705 (1979) [hereinafter cited as *Former Civil Code Section 3369*].

2. Former CAL. CIV. CODE § 3369 (currently codified at CAL. BUS. & PROF. CODE §§ 17200-17208 (West Supp. 1980) (as amended 1977)). The 1977 Amendment repealed § 3369 from the California Civil Code and enacted identical provisions in the California Business & Professions Code at §§ 17200-17208. Throughout this Note CAL. BUS. & PROF. CODE §§ 17200-17208 will be referred to collectively as § 17200.

3. The dearth of cases decided under § 17200 may be the result of the common practice of reaching a settlement agreement in an action before trial. See *Former Civil Code Section 3369*, *supra* note 1, at 714 n.53. See generally Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883 (1969); Note, *Unfair Competition and the Consumer—Barquis v. Merchants Collection Association, Inc.*, 24 HASTINGS L.J. 537, 549 (1973) [hereinafter cited as *Unfair Competition and the Consumer*].

4. "As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) or Part 3 of Division 7 of the Business and Professions Code." CAL. BUS. & PROF. CODE § 17200 (West Supp. 1980).

who successfully pursue claims under section 17200.⁵ It is doubtful consumers will bring suit to enforce their rights when they will be burdened with costly litigation expenses even if their claim is successful,⁶ thus leaving public interest groups and government agencies as the primary vehicles for enforcing claims against unfair business practices.⁷ As recent history aptly illustrates, relegating sole responsibility for pursuing claims under section 17200 to public interest groups and government agencies has led to woefully inadequate protection against unfair business practices for California consumers.

This Note offers three proposals for ensuring the effectiveness of section 17200 in protecting California consumers against unfair business practices. First, the rules and decisions interpreting section 5⁸ of the Federal Trade Commission Act (FTCA) should be adopted to establish minimum standards of business conduct in California.⁹ If the Federal Trade Commission (FTC) has determined that a practice is unfair, California courts should accordingly hold that the practice is unfair and violative of section 17200. Section 5 and section 17200 are virtually identical in language,¹⁰

5. In *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976), the California Supreme Court refused to award damages for injuries resulting from an unfair business practice. The court, relying on the statutory language of former § 3369, held that an injunction was the appropriate remedy in an action brought by a private party. See notes 102-10 & accompanying text *infra*.

6. See Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966).

7. See *id.* See also *Former Civil Code Section 3369*, *supra* note 1.

8. 15 U.S.C. § 45(a)(1) (1976) (amended 1979). Section 5 states in part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* See text accompanying notes 15-60 *infra*. See also Note, *Unfairness Without Deception: Recent Positions of the Federal Trade Commission*, 5 LOY. CHI. L.J. 537 (1974) [hereinafter cited as *FTC Unfairness Doctrine*].

9. Many states specifically incorporate FTC decisions or federal court interpretations of the FTCA into their consumer protection statutes. See, e.g., MASS. GEN. LAWS ANN. ch. 93A, 2(b) (West Supp. 1980); *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748 (1974); N.Y. GEN. BUS. LAW § 349(d) (McKinney Supp. 1979); *In re Lefkowitz v. Colorado State Christian College of the Church of the Inner Power, Inc.*, 76 Misc. 2d 50, 346 N.Y.S.2d 482 (1973). Other states incorporate only the interpretation of the FTCA given by federal courts and not rulings by the FTC. See, e.g., TEX. BUS. & COM. CODE ANN. tit. 2, § 17.46(c)(1) (Vernon Supp. 1979) (pursuant to 1977 amendments, Texas now incorporates FTC rulings for injunctive actions by the state, but not for private consumer actions for damages). See also WASH. REV. CODE § 19.86.920 (West 1978). For a general discussion and a comprehensive statistical analysis of the states adopting FTC rulings and interpretations as authority for their consumer legislation, see C. SMITH & C. WHITE, *FTC TRADE REGULATION* 433-39, 451-54 (1979).

10. See notes 89-90 & accompanying text *infra*.

historical development,¹¹ and underlying purpose,¹² thereby ensuring that adoption of FTC standards would further the legislative intent to protect consumer rights that is found in section 17200. Moreover, acceptance of this proposal would draw upon the widely acknowledged expertise of the FTC¹³ as well as provide for more predictable enforcement of section 17200. Finally, adoption of FTC standards would ensure that California businesses have notice of prohibited activities through FTC publication of the business practices that have been determined to be unfair.¹⁴ This Note further argues that damages should be available to private litigants bringing suit under the unfairness provision of section 17200. Finally, it will be shown that if the California courts adopt the FTC standards of unfairness, punitive damages are an appropriate remedy for intentional violations of section 17200.

Section 5 of the Federal Trade Commission Act

Following the United States Supreme Court decision in *Standard Oil Co. v. United States*,¹⁵ the Senate authorized the Interstate Commerce Commission to conduct a comprehensive investigation of the inadequacies of the Sherman Antitrust Act.¹⁶ As a result of this study, President Wilson called for substantive legislation prohibiting unfair practices in a business competition context¹⁷ and for the creation of a government agency to oversee implementation of this legislation.¹⁸ This directive led to the passage of the Federal Trade Commission Act¹⁹ and creation of the Federal

11. See note 91 & accompanying text *infra*.

12. See notes 84-90 & accompanying text *infra*.

13. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). See also *FTC Unfairness Doctrine*, *supra* note 7, at 560.

14. 15 U.S.C. § 57a(b) (1976). See 1 S. KANWIT, *FEDERAL TRADE COMMISSION* § 6.03 (1979) [hereinafter cited as KANWIT].

15. 221 U.S. 1 (1911). *Standard Oil* involved an unlawful combination formed by Standard Oil in order to dominate and control the oil industry. The Supreme Court held that violation of the Sherman Antitrust Act demanded a twofold remedy: first, to forbid the continuance of the illegal acts of combination; and second, to dissolve the existing combination to neutralize the existing monopoly. *Id.* at 77-78. See also *United States v. America Tobacco Co.*, 221 U.S. 106 (1911) (a companion case).

16. 47 CONG. REC. 1225-26 (1911). The report was presented in February of 1913. See S. REP. NO. 1326, 62d Cong., 3d Sess. (1913).

17. See S. REP. NO. 597, 63d Cong., 2d Sess. 8-9 (1914).

18. 51 CONG. REC. 1978-79 (1914).

19. 15 U.S.C. §§ 41-77 (1976 & Supp. II 1978).

Trade Commission.²⁰ Recognizing that the FTC would develop expertise in the regulation of unfair business practices, Congress intentionally left section 5 of the FTCA rather vague in order to allow the Commission a measure of discretion in determining the acts or practices that are unfair and thus prohibited under section 5.²¹

The authority of the FTC initially was given a narrow interpretation by the courts. In the 1920 decision of *FTC v. Gratz*,²² the FTC's power to enjoin a tying agreement²³ as an unfair practice was challenged. The Supreme Court held that the courts, not the Commission, should determine whether the agreement was unfair under section 5,²⁴ thus limiting the Commission's power to prohibit unfair business practices to enjoining practices that had previously been declared unfair by the judiciary.

Eleven years later, the FTC's power was further limited by the decision in *FTC v. Raladam Co.*²⁵ Raladam claimed its product was an effective and safe cure for obesity. Finding the product neither an effective cure for obesity nor safe for human consumption, the FTC issued a cease and desist order under section 5(b)(1) of the FTCA.²⁶ The Supreme Court revoked the order, holding that the FTC had acted beyond its jurisdiction because it had not shown the marketing of the product produced adverse effects on competition.²⁷ Although ample evidence was introduced to demonstrate that the product was unhealthy and ineffective, the Supreme Court allowed Raladam to continue marketing the product.²⁸

Despite these early restrictions, the jurisdiction of the FTC eventually was significantly expanded. In *FTC v. R.F. Keppel & Bros., Inc.*,²⁹ the Supreme Court held that the marketing of candy by using an element of chance to determine its price was an unfair

20. *Id.* § 41.

21. *Id.* See also H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914); 51 CONG. REC. 8856 (1914).

22. 253 U.S. 421 (1920).

23. The tying agreement made the sale of cotton ties contingent upon the purchase of cotton bagging, a separate item. *Id.* at 424.

24. *Id.* at 427.

25. 283 U.S. 643 (1931).

26. This is the remedy generally employed by the FTC and is authorized by 15 U.S.C. § 45(b) (1976).

27. 283 U.S. at 648-50, 652-54.

28. *Id.*

29. 291 U.S. 304 (1934).

business practice.³⁰ Although the Court reiterated that unfairness is primarily a question for judicial determination, it held that the FTC's determination of unfairness is entitled to great deference because the FTC is "a body specially competent to deal with [this situation] by reason of information, experience and careful study."³¹ *Keppel* thus expressly rejected the *Raladam* requirement that the activity adversely affect business competitors, and further acknowledged the value of the FTC's definition of an unfair practice under section 5.

The adoption of the Wheeler-Lea Amendment³² of the FTCA in 1938 codified the extension of section 5 to include the prohibition of unfair business practices perpetrated upon consumers. The amendment provides that "unfair methods of competition" are unlawful.³³ That the amendment was intended to include the interests of consumers within the protection of section 5 is indicated by its legislative history: "[T]his amendment makes the consumer, who may be injured by an unfair practice, of equal concern, before the law with the merchant or manufacturer injured by unfair methods of a dishonest competitor."³⁴

Until recent years, however, courts continued to follow the holding in *Gratz*³⁵ and restricted the FTC's power to promulgate trade regulation rules regarding practices that had not been judicially determined to be unfair. In 1964 the Commission nevertheless promulgated a rule³⁶ requiring manufacturers to disclose that cigarette smoking is "dangerous to health and may cause death from cancer or other diseases."³⁷ Failure to disclose this information was deemed to be an unfair business practice and thus violative of section 5.³⁸ Eight years later, in *FTC v. Sperry & Hutchinson Co.*,³⁹ the Supreme Court cited and implicitly approved an

30. *Id.* at 308.

31. *Id.* at 314 (quoting S. REP. NO. 597, 63d Cong., 2d Sess. 9 (1914)).

32. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (1976)).

33. *Id.*

34. H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937). See also S. REP. NO. 1705, 74th Cong., 2d Sess. 2-3 (1936).

35. See, e.g., *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923); *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923). See also *FTC Unfairness Doctrine*, *supra* note 7, at 538-39.

36. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (1964).

37. *Id.* at 8325.

38. *Id.*

39. 405 U.S. 233 (1972).

FTC statement that set forth factors for determining whether a practice was unfair under section 5 as an appropriate guide to standards of unfairness.⁴⁰

The decision in *National Petroleum Refiners Ass'n v. FTC*⁴¹ judicially acknowledged the FTC's power to promulgate substantive rules. *National Petroleum* involved a challenge to the Commission's authority to issue rules defining illegal conduct. The District of Columbia Circuit Court of Appeals reviewed the legislative history and the language of the FTCA and concluded that the Commission was empowered to issue substantive rules.⁴²

The FTC Improvement Act of 1975⁴³ confirmed the Commission's authority to promulgate substantive rules by authorizing the Commission to "explore, identify and define those competitive practices that should be forbidden as 'unfair' because [they are] contrary to public policy."⁴⁴ Section 18⁴⁵ of the FTCA provides that the FTC may make broad interpretive rules as well as substantive rules "to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct."⁴⁶ After 1975 it was thus firmly established that the FTC is empowered to interpret "unfairness" in business practices through both promulgation of trade regulation rules and adjudicatory proceedings.⁴⁷

40. These factors included: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Id.* at 244 n.5 (quoting 29 Fed. Reg. 8355 (1964)).

41. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

42. 482 F.2d at 697-98. The court in *National Petroleum* referred to a bill introduced in the Senate, S. 986, 92d Cong., 1st Sess. (1971), that would have severely curtailed the FTC's substantive rulemaking power in the area of "unfair and deceptive practices." 482 F.2d at 697 n.40. This bill did not pass but it was nevertheless reintroduced in 1973 as a part of the Magnuson-Moss Act. The House portion of this bill would have completely eliminated FTC power to promulgate rules regulating competitive matters, *see* H.R. 9717, 93rd Cong., 2d Sess. (1973), but the language was removed following Senate opposition.

43. Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2193.

44. 29 Fed. Reg. 8349 (1964).

45. 15 U.S.C. § 57a (1976). For a general discussion of the provision, *see* KANWIT, *supra* note 14, ch. 6.

46. H.R. REP. No. 93-1606, 93d Cong., 2d Sess. 31 (1974).

47. The United States Supreme Court has held that when an agency is vested with both adjudicative and legislative powers the agency may impose regulatory controls by general rules or ad hoc litigation. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

Proceedings to promulgate trade regulation rules may be commenced by the Commission on its own initiative or pursuant to any petition filed with the FTC stating reasonable grounds for the necessity of instituting a particular rule.⁴⁸ Prior to any proceeding, however, notice must be published in the Federal Register and, to the extent practicable, made available to all interested parties.⁴⁹ The Commission is also required to accept all information concerning the proposed rule until forty-five days before commencement of the rulemaking proceeding.⁵⁰ At the close of the proceeding, the Commission may issue any appropriate rule⁵¹ prohibiting unfair practices adversely affecting the public interest,⁵² which thereafter carries the force of substantive law. Judicial challenge to these rules is limited to questions of their legality and the scope of the Commission's jurisdictional authority.⁵³ In order to establish a violation of section 5, the Commission need only show knowledge and violation of the regulation. The violation of an FTC regulation is thus considered to be unfair *per se*.

The adjudicatory interpretations of "unfairness" often derive from cease and desist actions brought under section 5.⁵⁴ Under this provision, the FTC can order a practice to be discontinued if the Commission determines that the practice is unfair.⁵⁵ In order to

48. 15 U.S.C. §§ 45-58 (1976). *See also* 16 C.F.R. § 0.4 (1980). The FTC must still comply with the standards and requirements imposed upon most federal agencies by the Administrative Procedure Act. 5 U.S.C. §§ 551-559 (1976).

49. 16 C.F.R. § 1.26(b) (1980). An exception to the requirement of making a proposed rule available to all interested persons is provided by § 1.26. No such availability is required if the FTC, for good cause, "finds that notice and public procedure relating to the rule are impractical, unnecessary or contrary to the public interest and [the FTC] incorporates such finding and a brief statement of the reasons therefore in the rule." *Id.* The provision is referred to as the FTC Rules of Practice. *See also* 5 U.S.C. § 553(b) (1976).

50. 16 C.F.R. § 1.13(a) (1980).

51. These rules must be published in the Federal Register. 16 C.F.R. § 1.14 (1980).

52. 29 Fed. Reg. 8349 (1964).

53. 15 U.S.C. § 57(a)-(e) (1976). *See* *Belton Elec. Corp. v. FTC*, 402 F. Supp. 590 (N.D. Ill. 1975).

54. The Commission will initially issue a cease and desist order under 15 U.S.C. § 45(b) (1976). Civil penalty actions may be brought under § 45(l) for violation of the order. The Commission may also bring an action to recover civil penalties for violation of a trade regulation rule or a prior agency determination under § 45(m). Additionally, 1973 amendments added § 53(b), allowing the FTC to seek injunctive relief for any violations or threatened violations of the Act. Act of November 16, 1973, Pub. L. No. 93-153, tit. IV, § 408(f), 87 Stat. 592.

55. Under 15 U.S.C. § 45(l) (1976), the maximum penalty for a continuing failure to obey an FTC order is \$10,000 per day. Such penalties accrue only after an order becomes final and while an order is in effect. Civil penalty actions for such violations are subject to a

determine if a cease and desist order should issue, the Commission must first decide if the practice in question is unfair. If the practice is found to be unfair, a party subject to the final cease and desist order may be assessed substantial penalties for continuing practices which violate the order. Moreover, nonparties can be charged with violation of the cease and desist order and subject to civil penalties if they are found to be engaged in substantially similar acts or practices.⁵⁶ The FTC ensures that companies which may engage in activities similar to the prohibited acts and practices receive notice of the unlawfulness of such actions and of the possible civil penalties for engaging in such conduct.⁵⁷

The Commission's power to regulate trade practices is now virtually unequalled.⁵⁸ Its jurisdiction encompasses both practices between competitors and practices that solely affect consumers. Furthermore, the Commission is given wide latitude to enforce section 5⁵⁹ because of its expertise in determining whether particular remedies will be effective in eliminating unfair trade practices. The FTC has comprehensively defined and codified the term "unfair" through its adjudicatory determinations and trade regulation rules⁶⁰ and thus has become better prepared to fulfill its function of promoting confidence in the marketplace and eliminating unethical practices in the business community.

Section 17200 of the California Business and Professions Code

Liability for unfair competition in California originally was

five year statute of limitations. 28 U.S.C. § 2462 (1976). See *FTC v. Lukens Steel Co.*, 454 F. Supp. 1182 (D.D.C. 1978).

56. See KANWIT, *supra* note 14, § 10.09.

57. See *id.* This procedure has been criticized by an FTC Commissioner. Pitofsky, *FTC Improvement Act*, 45 A.B.A. ANTITRUST L.J. 117, 119-20 (1976).

58. Recent congressional hearings, however, indicate that the FTC jurisdiction will soon be limited and its rulemaking authority subject to congressional veto. See ANTITRUST & TRADE REG. REP. (BNA) No. 941, at A-24 (Nov. 29, 1979).

59. See notes 21, 29-31 & accompanying text *supra*.

60. Countless business practices have been held unlawful under this two pronged approach. One commentator notes that "[t]he types of sales practices which have been found unfair by the FTC have been limited only to the extent of the seller's imagination." *FTC Unfairness Doctrine*, *supra* note 8, at 546. For an exhaustive list of practices labeled "unfair" by the FTC, see 2 TRADE REG. REP. (CCH) ¶¶ 7903-7960. See also 16E J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 41.01 (1979).

grounded in tort law,⁶¹ which permitted the victim of an unfair business practice to recover damages for interference with prospective advantage.⁶² This cause of action, however, was limited to suits instituted between business competitors.⁶³ Although prohibition of unfair practices extended to infringement of trade names tending to confuse the public,⁶⁴ the prevailing common law rule for consumers was *caveat emptor*.

In 1933, the predecessor to California Business and Professions Code section 17200, former Civil Code section 3369, was revised to impose statutory liability for engaging in acts of unfair competition.⁶⁵ It provided that any act of unfair competition occurring within California may be enjoined.⁶⁶ Subsequent amendments have not significantly altered the substantive provisions of the statute.⁶⁷

Initially, former Civil Code section 3369 was invoked exclusively to enjoin infringements upon the use of trade names.⁶⁸ When a business had developed an identity with a trade name commonly known to the public, the courts considered use of that trade name by competing enterprises to be unfair.⁶⁹ The California Supreme Court extended the protection against infringement of a trade name in *Academy of Motion Picture Arts & Sciences v. Benson*.⁷⁰

61. See, e.g., *American Auto. Ass'n v. American Auto. Owners Ass'n*, 216 Cal. 125, 13 P.2d 707 (1932); *Yellow Cab Co. v. Sachs*, 191 Cal. 238, 216 P. 33 (1923); *Dunston v. Los Angeles Van Co.*, 165 Cal. 89, 131 P. 115 (1913). See also W. PROSSER, *LAW OF TORTS* 949-69 (4th ed. 1971).

62. W. PROSSER, *LAW OF TORTS* 949-69 (4th ed. 1971). Interference with prospective advantage dealt with the use of violence or threats of violence to drive customers from the plaintiff's market. Later decisions involved cases arising from nonviolent interference with contract.

63. *Id.*

64. *Id.*

65. Prior to 1933, CAL. CIV. CODE § 3369 read: "Neither specific nor preventative relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition." See *Former Civil Code Section 3369*, *supra* note 1, at 706 n.5.

66. Former CAL. CIV. CODE § 3369(5) (currently codified at CAL. BUS. & PROF. CODE §§ 17200-17208 (West Supp. 1980) (as amended 1977)).

67. *Id.* See also *Former Civil Code Section 3369*, *supra* note 1.

68. See *Former Civil Code Section 3369*, *supra* note 1, at 706-08. See generally Note, *Unfair Competition and the Consumer—Barquis v. Merchants Collection Association, Inc.*, 24 HASTINGS L.J. 537 (1973).

69. See *Ball v. American Trial Lawyers Ass'n*, 14 Cal. App. 3d 289, 92 Cal. Rptr. 228 (1971); *MacSweeney Enterprises, Inc. v. Taratino*, 106 Cal. App. 2d 504, 235 P.2d 266 (1951).

70. 15 Cal. 2d 685, 104 P.2d 650 (1940).

Without restricting the scope of the statute to activities affecting competitors, the court held that in order to establish a violation under former Civil Code section 3369 it need only be proven that the alleged act "violates the fundamental rules of honesty and fair dealing,"⁷¹ thus implicitly holding that an act unfair to the public at large was unlawful regardless of its effect on business competitors.

In 1962, the California Court of Appeal in the case of *People ex rel. Mosk v. National Research Co.*⁷² removed most of the remaining impediments to the use of former Civil Code section 3369 in preventing unfair business practices that affect consumers. National Research printed forms that were similar to official documents used by the California Department of Motor Vehicles and the Department of Education. The forms, known as "skiptracers," were sold to collection agencies in California that recorded the names and last known addresses of debtors on the forms and mailed the forms back to National Research in Sacramento, the state capitol. National Research then mailed the forms to the debtors asking for their addresses, driver's license numbers, vehicle license numbers, and places of employment, as well as other pertinent information. The forms appeared to be official and debtors willingly responded by returning the forms to National Research. The court first noted that application of former Civil Code section 3369 was not restricted to claims involving alleged trade name infringement.⁷³ The court stated that the FTC had previously declared the use of "skiptracers" in this manner to be unfair and illegal, and "[i]n view of the similarity of the language and obvious identity of purpose of the two statutes, decisions of the federal court as to what business practices are unfair are more than ordinarily persuasive."⁷⁴ Thus, the court's analogy potentially broadened the scope of former Civil Code section 3369 to apply in every circumstance in which the FTC had declared a given practice unfair under section 5.

Notwithstanding this sequence of precedent, recent California decisions have left the breadth of the California unfairness doctrine undefined. In *Barquis v. Merchants Collection Association*

71. *Id.* at 691, 104 P.2d at 653 (quoting *American Philatelic Soc'y v. Clairbourne*, 3 Cal. 2d 689, 46 P.2d 135 (1935)).

72. 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962).

73. *Id.* at 770, 20 Cal. Rptr. at 520.

74. *Id.* at 773, 20 Cal. Rptr. at 522.

Inc.,⁷⁵ the California Supreme Court acknowledged in dicta that unfairness encompassed not only fraudulent practices but also included business practices that were not fraudulent but nevertheless were unfair under principles of business morality and fair dealing.⁷⁶ Justice Tobriner stated that "section 3369 . . . does not limit its coverage to . . . 'deceptive' practices, but instead explicitly extends to any 'unlawful, unfair or deceptive business practice.'"⁷⁷ He further noted: "[T]he Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct *in whatever context such activity might occur*."⁷⁸ The decision indicates that the concept of unfairness under the present proscription of unfair business practices contained in section 17200 is distinguishable from the concepts of fraud and deception, and that wrongful activity not characterized as fraudulent may still be unlawful in California. Unfortunately, the court in *Barquis* was not presented with an opportunity to consider fully the unfairness question; because the conduct at issue violated statutory venue requirements, it was enjoined under section 17200 as an unlawful business practice.⁷⁹

Four years later, the California Supreme Court, in *Chern v. Bank of America*,⁸⁰ again failed to provide adequate standards for evaluating the statutory meaning of "unfairness." *Chern* involved the defendant's use of a 360-day year to compute interest rates. The actual rate charged for a loan was thus slightly higher than the advertised rate.⁸¹ The court held the practice unfair under the predecessor to section 17200. In considering the term "unfair," the court urged that the statute "affords protection against the probability or likelihood as well as the actuality of deception or confusion."⁸² The court did not, however, attempt to define unfair-

75. 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

76. *Id.* at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757.

77. *Id.*

78. *Id.* (emphasis added).

79. *Id.* at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758.

80. 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976).

81. In *Chern*, the rate quoted over the phone was 9% but computed on a 360-day year, thus inflating the rate to 9.13%. Although the difference was relatively insignificant in terms of individual borrowers, the total annual increases in revenue for Bank of America amounted to approximately \$5,000,000. See Amicus Curiae Brief for Appellant at 2, *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976).

82. 15 Cal. 3d at 876, 544 P.2d at 1316, 127 Cal. Rptr. at 116 (quoting *Payne v. United California Bank*, 23 Cal. App. 3d 850, 856, 100 Cal. Rptr. 672, 678 (1972)).

ness or analogize it to the FTC's interpretation of unfairness under section 5 of the FTCA.⁸³

Section 5 As A Guideline For California

Despite acknowledging that section 5 is "persuasive precedent," and notwithstanding the similarity in language between sections 5 and 17200, California courts have failed to set forth even minimum standards of fairness for business practices affecting consumers. Recognition of decisions under section 5 of the FTCA as a minimum standard of conduct in California would serve this vital function.

Although it is difficult to uncover the precise legislative purpose of section 17200,⁸⁴ a central purpose may be inferred from judicial interpretation of the statute. *Barquis* interpreted section 17200 to prohibit not only deceptive and fraudulent conduct, but also wrongful business conduct.⁸⁵ Wrongful generally implies a violation of the basic tenets of honesty and fair dealing,⁸⁶ encompassing practices which are not illegal as such, but that nonetheless disturb the conscience of the common person. "Wrongful practices," as defined in *Barquis*, includes those acts that should not be allowed under general principles of fairness, even if they are otherwise within the narrow confines of the law. Thus, it would appear that the primary purpose of section 17200 and the purpose of the Wheeler-Lea Amendment to section 5 are identical in their underlying commitment to eliminate practices that are not fair to consumers and thus adversely affect the public interest.

The similarity of language in section 17200 and section 5 further illustrates their identity of purpose. Both statutes proscribe a wide range of conduct: section 17200 prohibits "unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising"⁸⁷ while section 5 prohibits "unfair or decep-

83. The court did recognize that federal regulations, requiring information concerning competing credit plans be supplied to bank customers, support the decision in *Chern. Id.* at 877, 544 P.2d at 1316, 127 Cal. Rptr. at 116. See 12 C.F.R. §§ 226.1(a)(2), 226.101(a)-(c) (1980).

84. But see note 114 & accompanying text *infra*.

85. *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111, 496 P.2d 817, 831, 101 Cal. Rptr. 745, 757 (1972).

86. See *id.* at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758.

87. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1980).

tive acts or practices.”⁸⁸ Section 17200 was purposefully drafted in rather vague terms to ensure that novel schemes involving unfair business practices would be unlawful under its provisions.⁸⁹ Similarly, the language in section 5 is virtually unrestricted to ensure the FTC’s power to restrict any business practices that might be considered unfair.⁹⁰

Both section 5 and section 17200 have been judicially expanded as the need for more stringent regulation of the business practices affecting consumers was recognized. Only after discarding the narrow construction of the statutes as prohibiting only unfair practices between business competitors and overruling many decisions imposing significant jurisdictional restrictions upon the right to enforce claims under these statutes were the unfairness doctrines under each statute evolved to accord protection to the consumer. This parallel development⁹¹ demonstrates that the primary concern of both statutes is protection of the consumer from immoral or unethical acts and practices. Thus, decisions rendered by the FTC and federal courts, as well as trade regulations issued by the FTC, should be recognized as establishing minimum standards of conduct for businesses in California. Such an application would effectively define permissible acts and would guide California consumers in their decision to seek redress without unduly restricting the scope of the statute. Furthermore, adoption of FTC standards would give businesses actual knowledge of specific practices that have already been considered and determined to be unfair.⁹²

Recovery of Damages Under Section 17200

Section 17200 must allow the recovery of both compensatory and punitive damages in order to provide consumers with an effective remedy against unfair business practices.⁹³ Private enforce-

88. 15 U.S.C. § 45(a)(1) (1976) (amended 1979).

89. See *American Philatelic Soc’y v. Clairbourne*, 3 Cal. 2d 689, 698, 46 P.2d 135, 140 (1935); see also *International Ass’n of Cleaning & Dye House Workers v. Landowitz*, 20 Cal. 2d 418, 126 P.2d 609 (1942).

90. H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914). See also 51 CONG. REC. 8856 (1914); 29 Fed. Reg. 8349 (1964).

91. See notes 15-47, 50-75 & accompanying text *supra*.

92. See footnote 57 & accompanying text *supra*.

93. This is particularly significant because § 5 of the FTCA does not provide for a private right of action. Thus California consumers cannot vindicate their rights under federal law. *Holloway v. Bristol-Meyers Corp.*, 327 F. Supp. 17 (D.D.C. 1971), *aff’d*, 485 F.2d

ment of the statute is ineffective without offering consumers the economic incentive to bring suit. Unfair business practices flourish when such conduct is rewarded by economic gain. Injunctive relief allows those engaging in unfair business activities to retain the economic gains reaped from such schemes prior to the issuance of the injunction. If injunctive relief is the sole remedy for protecting consumers against unlawful practices, the development of novel schemes that are not within the ambit of prior injunctions will be encouraged. Effective enforcement of the prohibition against unfair business practices requires that those engaging in such conduct be liable for compensatory damages for unlawful gains and, under appropriate circumstances, be subject to exemplary damages as a deterrent to future unfair business practices.⁹⁴

Section 17203 of the Business and Professions Code states that "[a]ny person performing or proposing to perform an act of unfair competition within this state may be *enjoined*"⁹⁵ The existence of injunctive relief does not preclude private rights of action for damages under section 17200.⁹⁶ Nevertheless, ambiguities plaguing the California Supreme Court's decision in *Chern v. Bank of America*⁹⁷ arguably compel the conclusion that private litigants may seek only injunctive relief under section 17200.⁹⁸ Such an interpretation disregards prior damage awards recovered by private parties under section 17200 and its predecessor.⁹⁹ It also disregards the court of appeal's holding in *United Farm Workers v. Superior Court*,¹⁰⁰ just one year before *Chern*, in which the court recognized that "the breach of a duty imposed by [the predecessor to section 17200] gives rise to a cause of action for damages if damages can

986 (D.C. Cir. 1973).

94. In *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (1979), the California Supreme Court emphasized the deterrent aspect of California consumer laws. The court urged that "[t]o permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom." *Id.* at 451, 591 P.2d at 57, 153 Cal. Rptr. at 33 (quoting *SEC v. Golconda Mining Co.*, 327 F. Supp. 257, 259-60 (S.D.N.Y. 1971)).

95. CAL. BUS. & PROF. CODE § 17203 (West Supp. 1980) (emphasis added).

96. *Id.* § 17204 (emphasis added).

97. 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976).

98. *Id.* at 875, 544 P.2d at 1314-15, 127 Cal. Rptr. at 114-15.

99. See, e.g., *Hesse v. Grossman*, 152 Cal. App. 2d 536, 313 P.2d 625 (1957); *Wood v. Peffer*, 55 Cal. App. 2d 116, 130 P.2d 220 (1942).

100. 47 Cal. App. 3d 334, 120 Cal. Rptr. 904 (1975).

be shown. The fact that the statutes sound in equity and by their terms do not specify that damages may be awarded does not bar the recovery of damages"¹⁰¹

A careful analysis of the factual setting and the precise holding in *Chern* refutes an interpretation that *Chern* bars claims for damages under section 17200. Further, three independent factors operate to support the right to recovery of damages under section 17200. First, the legislature's amendment to former Civil Code section 3369, the predecessor to section 17200, following the *Chern* decision provided for a right to damages under the statute. Second, recovery of damages under section 17200 may be justified under a tort in essence theory whereby a statutory violation is treated as the equivalent of a tortious act. Third, past decisions granting monetary awards in actions brought under former Civil Code section 3369 compel the right to recover damages under section 17200 under principles of stare decisis.

Chern v. Bank of America

*Chern v. Bank of America*¹⁰² involved a class action for breach of contract, damages, and injunctive relief. The plaintiff, Gertrude Chern, telephoned the defendant, Bank of America, to arrange a \$5,000 loan. She was informed that the rate of interest on the loan would be 9%, and was presented with a \$5,000 promissory note bearing a 9% per annum interest rate. Subsequently, however, she was shown a Federal Truth in Lending Statement that indicated the loan was actually at a 9¼% annual rate. Ms. Chern informed the bank of this discrepancy but nevertheless executed the required forms after a bank employee explained that the difference resulted from the bank's use of a 360-day year to compute interest.

After careful consideration, the court dismissed both the claim for damages based upon breach of contract and the claim for damages based upon false and misleading statements under section 17500 of the Business and Professions Code.¹⁰³ The court held that Ms. Chern's knowledge of the 9¼% interest rate at the time she signed the loan agreement barred her right to recovery of damages

101. *Id.* at 334, 120 Cal. Rptr. at 911. It should be noted that the California Supreme Court in *Fletcher* cites *United Farm Workers* with approval. 23 Cal. 3d at 452-53, 591 P.2d at 58, 153 Cal. Rptr. at 34.

102. 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976).

103. *Id.* at 873-74, 544 P.2d at 1314-15, 127 Cal. Rptr. at 114-15.

for breach of contract.¹⁰⁴ The court further held that section 17500 of the Business and Professions Code, which prohibits the making of false or misleading statements in business practices, may only be enforced by the issuance of an injunction and did not give rise to an action for recovery of damages.¹⁰⁵ The injunctive relief granted by the court in *Chern* arose from violation of Business and Professions Code section 17535 and the predecessor to section 17200, former Civil Code section 3369.¹⁰⁶

Although *Chern* concluded that Business and Professions Code section 17500, a provision with language similar to section 17200,¹⁰⁷ does not authorize recovery of damages,¹⁰⁸ it should not be construed to bar the recovery of damages under section 17200. Damages were denied only under Business and Professions Code sections 17500, 17535, and 17536.¹⁰⁹ No claim for damages was instituted under the theory that the defendant's conduct constituted an unfair business practice,¹¹⁰ and thus *Chern* does not limit the remedies available under section 17200 to injunctive relief.¹¹¹ Once it is determined that the right to recover damages under section 17200 is not precluded by the decision in *Chern*, the question arises whether the judiciary should allow a private right of action for damages to be brought under section 17200. The legislative history of section 17200, cases decided under section 17200 and its predecessor, as well as relevant legal doctrine, support the conclusion that section 17200 allows a private right of action for damages.

In 1976, after the decision in *Chern*, division 6 of former Civil Code section 3369 was amended to state: "Unless otherwise expressly provided, the remedies or penalties provided by this section and Section 3370.1 are cumulative to each other *and to the remedies or penalties available under all other laws of this state.*"¹¹² By application, the California Legislature expressly authorizes *any* remedy available under the laws of California, includ-

104. *Id.*

105. *Id.* at 875, 544 P.2d at 1315, 127 Cal. Rptr. at 115.

106. *Id.* at 875-76, 544 P.2d at 1315-16, 127 Cal. Rptr. at 115-16.

107. CAL. BUS. & PROF. CODE § 17500 (West Supp. 1980).

108. 15 Cal. 3d at 875, 544 P.2d at 1315, 127 Cal. Rptr. at 115.

109. *See id.* at 873-75, 544 P.2d at 1314-15, 127 Cal. Rptr. at 114-15.

110. *Id.* at 873, 544 P.2d at 1314, 127 Cal. Rptr. at 114.

111. In fact, discussion of former Civil Code § 3369, the predecessor of § 17200, is noticably absent in the portion of the opinion in *Chern* regarding damages.

112. Cal. Stat. 1976, ch. 1005, § 1, at 2378 (emphasis added). This section has now been codified at CAL. BUS. & PROF. CODE § 17205 (West Supp. 1980).

ing compensatory and exemplary damages, to a litigant who commences an action under section 17200.¹¹³ Moreover, because complaints under this statute can be instituted by "any person acting for the interests of itself, its members or the general public,"¹¹⁴ private actions to enforce the unfairness doctrine are not limited to an injunction.

The legislative history of the amendment further indicates the intent of the legislature to provide private litigants with a right to pursue a claim for damages under section 17200. The Assembly File Analysis¹¹⁵ states:

Under existing law, an injunction can be obtained against any person engaging in an act of unfair competition. . . . This bill provides that when an injunction is sought, the court can make *whatever orders or judgment as may be necessary to prevent further acts of unfair competition or to restore property to those who lost it* as a result of unfair competition. This bill seeks to close this loophole by which some businesses seek to avoid the imposition of the more severe unfair competition penalties by providing that the remedies and penalties contained in the Civil Code are cumulative to each other and all other laws of this state.¹¹⁶

113. Another possible basis for awarding monetary recovery to private litigants injured by unfair business practices is recovery in restitution. This theory was accepted by the California Supreme Court in *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973), where the court recognized that a statute prohibiting unfair advertising gives rise to restitution. The court analogized § 17535 of the Business and Professions Code to provisions embodied in former Civil Code § 3369, and concluded that injunction provisions were insufficient to enforce the law effectively. The imposition of an injunction, the court stated, only serves to spur new, more creative, schemes that are not encompassed by the language of the injunction. The incentive encourages the unscrupulous to devise different schemes, reap the gains incurred as a result, and simply stop when an injunction is issued. Without fear that compensation will be exacted, little or no economic incentive exists to refrain from engaging in the unfair practice and accumulating the temporary profits arising from the practice. Therefore, the court held restitution was an appropriate remedy for violations of § 17535. *Id.* at 289 n.3, 507 P.2d at 1404, 107 Cal. Rptr. at 196. The supreme court recently extended this doctrine in *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (1979), holding that violation of § 17535 authorizes restitution without "requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." *Id.* at 451, 591 P.2d at 56-57, 153 Cal. Rptr. at 33. The court reasoned that to allow the wrongdoer to retain the benefits of his or her wrongdoing would only encourage such conduct in the future.

114. CAL. BUS. & PROF. CODE § 17204 (West Supp. 1980).

115. The Assembly File Analysis was an experimental project conducted by the California Assembly Office of Research to compile legislative history on pending California legislation. However, not all bills are included and the project operated only in 1976 and 1977.

116. ASSEMBLY FILE ANALYSIS (1976) (emphasis added).

Very simply, the legislature wanted to ensure that those engaging in unlawful business activities would not retain the proceeds from their unlawful activity.

The right to damages under section 17200 is further supported by the "tort in essence" theory. The tort in essence theory, first set forth in *Czap v. Credit Bureau of Santa Clara Valley*,¹¹⁷ creates a private right of action for the violation of a statute that is designed to protect the public. *Czap* held that the violation of a statute embodying public policy is actionable by a member of the class of persons intended to be protected under the statute who is able to demonstrate that he or she sustained injury from the violation of the statute and establish causation between the breach of statutory duty and such injury.¹¹⁸ Once these elements are proven, the breach of statutory duty is considered a "tort in essence" and the individual is entitled to the same relief, including damages, that are available in an action under tort law, despite the absence of express language in the statute that authorizes actions for damages.¹¹⁹

A consumer who is the victim of an unfair business practice falls within the purview of this doctrine. The elements of injury and causation raise factual questions.¹²⁰ The third element, membership in the class intended to be benefited by the statute, is easily fulfilled by a consumer alleging injury because of an unfair business practice. The decisions in *National Research*, *Barquis*, and *Chern* all explicitly recognize that consumers are members of the class of citizens that the statute was designed to protect. Thus,

117. 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1970).

118. *Id.* at 6, 86 Cal. Rptr. at 420.

119. *Id.* (citing *Wetherton v. Growers Farm Labor Ass'n*, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969)). The Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700-16726 (West 1964 & Supp. 1980), another part of the California consumer protection law, does not expressly provide a right to injunctive relief to a private party. However, California courts have long held that if the statutory remedy is inadequate, judicial remedies will be imposed. Using this rationale, injunctions have been issued for violation of the Cartwright Act. *See* *Alfred M. Lewis, Inc. v. Warehousemen*, Local 542, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Kold Kist, Inc. v. Amalgamated Meat Cutters & Butchers Workmen*, 99 Cal. App. 2d 191, 221 P.2d 724 (1950). If an injunction may be appropriate where the Business and Professions Code provides only for monetary damages, then conversely, if an injunction is inadequate, damages should be awarded even though the statute refers only to injunctive relief.

120. In *Chern*, for example, the plaintiff demonstrated that she suffered damages under a simple mathematical calculation based upon the amount borrowed, the interest rate, and the repayment schedule. Causation was established by the relation between the inflated interest rate produced under a 360-day formula used by the defendant and the overpayments made by the plaintiff.

consumers should be entitled to damages for the tortious act of unfair competition.

A final rationale supporting the availability of the remedy of damages under section 17200 rests on the doctrine of stare decisis. California courts have awarded damages to private litigants in decisions based upon the prohibition of unfair business practices.¹²¹ *Chern* did not expressly preclude the availability of damages for consumers bringing suit under section 17200, and thus the past decisions allowing the recovery of damages remain valid precedent in California.

Punitive Damages

The availability of recovering punitive damages in actions brought by private litigants under section 17200 should not be foreclosed if section 17200 is to serve as a protector of consumer rights. Punitive damages are not awarded in the absence of specific statutory authorization¹²² unless the one pursuing a claim is "the immediate person injured"¹²³ by the wrongful conduct, and the recovery of punitive damages accords with legislative intent to impose civil penalties upon those engaging in proscribed conduct.¹²⁴ Both requirements are present in private actions brought under section 17200. A private litigant, unlike the state or other public entity, must prove his or her status as the immediate person injured by the alleged unfair business practice in order to state a cause of action under section 17200. The legislative intent to punish unfair business practices is apparent in the 1972 amendment¹²⁵ to the statute imposing a civil penalty, recoverable in civil actions by a district attorney or the attorney general, for the violation of section 17200. An award of punitive damages is similar to the imposition of a civil penalty; the effect in both cases is to deter future offenses. The legislature has decided that violation of section 17200 warrants punishment to deter an offender; thus, exemplary damages should be available as a deterrent when a consumer brings a private action under section 17200. If the recovery of punitive

121. See notes 99-101 & accompanying text *supra*.

122. *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

123. *Id.* at 287, 507 P.2d at 1402-03, 107 Cal. Rptr. at 194-95.

124. *Id.*

125. Cal. Stats. 1972, ch. 1084, § 2, at 2021 (adding CAL. CIV. CODE § 3370.1) (currently codified at CAL. BUS. & PROF. CODE § 17206 (West Supp. 1980)).

damages is not available to consumers bringing private actions under section 17200, the wrongdoer's ability to reap economic gains from unlawful practices may depend on the fortuity of whether his or her actions are curtailed in a suit brought by a public official or a private individual.

The primary element of proof necessary for an award of exemplary damages is a showing of intentional wrongdoing.¹²⁶ Actual knowledge of the unfairness of the practice, coupled with willful violation of a duty to refrain from such practices, forms the basis for recovery of exemplary damages. This common law rule has been codified in California to read:

In an action for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to actual damages, may recover exemplary damages for the sake of example and by way of punishing the defendant.¹²⁷

A business that has actual knowledge of the unfairness of a particular practice, but wilfully continues such a practice, should be found to exhibit oppression¹²⁸ and malice.¹²⁹ If section 5 were to be recognized as an appropriate standard for interpreting "unfairness" in California, FTC decisions and trade regulations would provide businesses with actual knowledge of the unfairness of their practices. Where the unfair trade practice can be characterized as a violation of defined standards for business conduct, the requisite malice and oppression then can be inferred,¹³⁰ thus warranting an award of exemplary damages.

Both the 1976 amendment to former Civil Code section 3369 and the tort in essence theory authorize an award of punitive damages. Through the 1976 amendment, the legislature expressly provided that "the remedies or *penalties* provided by [section 17200] are cumulative . . . to the remedies or *penalties* available under all

126. C. McCORMICK, LAW OF DAMAGES 280 (1935).

127. CAL. CIV. CODE § 3294 (West 1970).

128. Oppression has been defined as subjecting a person to "cruel and unjust hardship in conscious disregard of his rights." *Richardson v. Employers Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 246, 102 Cal. Rptr. 547, 556 (1972).

129. Malice under § 3294 implies an act conceived in the spirit of mischief or ill will with the intent to harm. *Gombos v. Ashe*, 158 Cal. App. 2d 517, 322 P.2d 933 (1958). Such malice may be inferred from the facts surrounding the case. *Richardson v. Employers Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 245, 102 Cal. Rptr. 547, 556 (1972).

130. Surely, a business practice which violates a known standard of fairness can be characterized as an act conceived in the spirit of mischief or ill will with the intent to harm.

other laws of this state."¹³¹ One such law is California Civil Code section 3294 which provides for punitive damages for the sake of example and to punish the defendant.¹³² Similarly, a tortious breach of a duty has long been recognized to authorize an award of exemplary damages under appropriate circumstances.¹³³ Violation of section 17200 as a tort in essence leads to the conclusion that this tortious violation warrants an award of punitive damages.

To understand why exemplary damages are needed to ensure effective enforcement of section 17200, it is important to focus on the practical aspects of consumer litigation. The most pronounced barrier to initiation of suit by a consumer is the high cost of litigation. The usual consumer claim ranges from \$25 to \$100.¹³⁴ Litigants usually suffer a net loss in actions where recovery is under \$200.¹³⁵ In most instances where consumers are the victims of unfair business practices it is therefore to the economic advantage of the consumer to forego pursuit of any redress. Most businesses realize this simple fact and accordingly have little incentive to refrain from unfair trade practices. Recognizing this problem a New York court has stated:

In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business.¹³⁶

The wrongdoer merely discounts a percentage of the revenue that is derived from unfair business practices to be used for litigation expenses. A business reaping economic gains from unfair business practices may realize that only a small percentage of all the consumers injured by such practices will pursue litigation. Assuming that every consumer bringing suit recovers compensatory damages, the business will still retain the earnings from the unfair practice suffered by the consumers unwilling to sue. Consumer claims that are not asserted because they are economically unattractive are ac-

131. Cal. Stats. 1976, ch. 1005, § 1, at 2378 (emphasis added). This section is currently codified at CAL. BUS. & PROF. CODE § 17205 (West Supp. 1980).

132. CAL. CIV. CODE § 3294 (West 1970).

133. See *id.*

134. See Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

135. See *id.* at 403.

136. *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961).

cumulated by the enterprise as revenue from the unfair practice. The deterrent function of the statute is usurped because businesses find it economically profitable to engage in unfair practices and simply return a portion of the revenue to the small percentage of wronged consumers who are able to object. The solution is to insert a disincentive through the award of exemplary damages.

To encourage private action under section 17200, actual and punitive damages must be available. There is neither a statutory bar nor a specific judicial restriction on damage awards for private litigants under section 17200. The California courts should take the next logical step in the development of section 17200 and explicitly allow recovery of damages for unfair business practices.

Conclusion

The proscription of unfair business practices in California that is contained in section 17200 of the Business and Professions Code is a veritable sleeping giant.¹³⁷ By defining a minimum standard of fairness through application of the FTC decisions and trade regulations promulgated under section 5 of the FTCA, potential litigants are afforded greater predictability of the probable outcome of their claim. Furthermore, by allowing the recovery of compensatory and punitive damages a broader sector of the public will be encouraged to assert their rights under section 17200. Thus, recognition of minimum standards of fairness coupled with the availability of damage awards will spur private action and ensure effective enforcement of section 17200.

137. See notes 3-7 & accompanying text *supra*.